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NAMTEC

N-103

National Association of Minority Telecommunication Executives and Companies

November 8, 1993

Mr. William Caton
Acting Secretary
Federal Communications Commission
Office of Small Business Activities
1919 M Street
Washington, DC 20554

SUBJECT: Notice of Proposed Rule Making - PP Docket No. 93-253

Dear Mr. Caton:

Please find enclosed the National Association of Minority Telecommunications Executives & Companies' (NAMTEC) response to the Implementation of Section 309(j) of the Communications Act Competitive Bidding Notice of Proposed Rule Making PP Docket No. 93-253.

Should you have further questions, please do not hesitate to contact me.

Sincerely,

Joseph Profit, Sr.
Chairman

JP/

655 15th Street, Suite 300 Washington, D.C. 20005 / 571 Culberson Street, Atlanta, GA 30310
Tel: (202) 857-8414 / Fax: (301) 986-8713 Tel: (404) 662-0745 / Fax: (404) 753-2045

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309 (j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

COMMENTS

National Association of Minority Telecommunications Executives & Companies

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
Implementation of Section 309 (j) of the Communications Act Competitive Bidding		PP Docket No. 93-253

COMMENTS

National Association of Minority Telecommunications Executives & Companies (NAMTEC), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these comments in response to the above-captioned Notice of Proposed Rule Making (NPRM) adopted by the Commission of September 23, 1993 and released on October 12, 1993.

I. INTRODUCTION

NAMTEC was organized in July, 1987 by representatives of minority telecommunication companies and professionals who were concerned about the future of the telecommunication industry and their role in that future. The founders, recognizing the extraordinary growth and innovations taking place within the industry; acknowledged the need to establish a vehicle to monitor public policy, legislation, and those governing bodies which implement these actions. Since 1987, NAMTEC has served as a national advocate for minority telecommunication companies and professionals, keeping its members informed and up-to-date on legislation and private sector initiatives influencing the voice/data telecommunications and transmission industry.

The objectives of NAMTEC's are:

- Operate as a non-profit corporation encouraging minority owned businesses and all those interested in securing satisfactory participation in the voice/data telecommunications systems industry.

- Encourage public acceptance of the voice/data telecommunications industry, trade and services.
- Improve voice/data telecommunications services to the public and private sectors.
- Gather appropriate non-proprietary industry and trade statistics.
- Cooperate with government agencies by providing administrators and legislators with non-proprietary information pertaining to the industry trade and services.

NAMTEC

Comments on Notice of Proposed Rule Making
PP Docket 93-253

NAMTEC Point By Point Comments

Paragraph 31 - Classes of licenses could be determined for both A, B, and C channels as to being network services of special applications. In the 10 MHz licenses for predetermined principle uses or applications.

Paragraph 32 - Same as for 31 and NAMTEC supports the theory of service for paying subscribers to be auctioned by class of license.

Paragraph 40 (Footnote 27) - Bidders should be able to bid for a stand-alone license as well as a combinal bid if they are a qualified small business, woman and minority owned and rural telco (SWAMAR) "designed entities" bidder and pay deposits.

Paragraph 47 - NAMTEC supports sealed group bids and oral bids for individual licenses.

Paragraph 50 - NAMTEC supports this paragraph.

Paragraph 52 - NAMTEC supports sequential bidding. MTA's first across all geographic areas, then C Channel 20 MHz, then 10 MHz channels. This allows small business, women owned and minority owned who are partnering to be best positioned to secure a license in their home area, individually or as a consortium member.

Paragraph 53 - NAMTEC disagrees on bidding in descending order of population. This would negatively affect small businesses, women and minority owned and rural telcos (SWAMAR) and favor large companies.

Paragraph 54 - NAMTEC supports as in paragraph 53.

Paragraph 57 - NAMTEC supports if done in same manner as we recommended in paragraph 52, i.e., 30 MHz first, etc. Also, we question how grouping could take place - geographic, type of group, i.e., swims, etc.

Paragraph 58 - NAMTEC agrees.

Paragraph 64 - NAMTEC agrees.

Paragraph 68 - NAMTEC agrees. Also, we would recommend that a balloon payment of payments in year 3, 4, and 5 be considered for small business (SWAMAR).

Paragraph 71 - NAMTEC agrees and feels treatment for default, could be treated as follows:

1. Give a 6-9 month cure period.

2. If not cured, make provisions to resell to previous second highest bidder.

3. If second highest bidder declines - open a re-bid figolec.

NAMTEC also agrees with the SBAC, distress sale concept.

Paragraph 74 - We agree. Also, allow combinal bidding for "SWAM groups covering the gamut of small business, women and minority owned businesses.

Paragraph 75 - NAMTEC generally disagrees with this paragraph, however, if women are certified as being socially and/or economically disadvantaged, then they should qualify as a part of the minority group. Women owned businesses that are fronted by others and are heavily financed such as, Cox Communications then they should be disqualified for preferences.

Paragraph 77 - NAMTEC agrees if the criteria deployed for this group by SIC code (4812). Rural telecos should be confined to their operating territories of 10,000 subscribers or less and are not controlled or financed by large companies or used profits derived from the benefit of securing loans from the Rural Electrical Association for their participation in their preference groups. Also, small business, women and minority owned businesses should have controlling interest, i.e., 51% of voting stock.

Paragraph 78 - Allow for "SWAMAR" consortia with controlling voting stock; also majors of board of directors is contracted by one or more concerned minority interests.

Paragraph 84 - Stipulate a three year hold period on licenses with performance criteria.

Paragraph 85 - NAMTEC agrees.

Paragraph 93 - NAMTEC agrees and suggest "American Wireless Communications Corp. (AWCC)" is an example of such "SWAMAR" consortia.

Paragraph 100 - NAMTEC agrees.

Paragraph 101 - NAMTEC agrees with minor ownership modifications, NAMTEC also request a pre-bid conference be held for (SWAMAR) prior to the actual action (15 days).

Paragraph 103 - NAMTEC thinks upfront payment should be high enough to keep out speculation, but not with "SWAMAR".

Paragraph 108 - NAMTEC agrees with the 60 days.

Paragraph 121 - NAMTEC believes strongly that "SWAMAR" consortia should have the same preference as individual "SWAMAR" bidders if the preferential measures are intended for members of the "SWAMARs" only in such consortia, therefore, the consortia bidding benefit should flow directly to the designated "SWAMARs" in the consortia.

Paragraph 123 - Combinal bidding should be permitted by set-aside groups. We believe that will enhance the ability of designated groups "SWAMAR" to compete with other licenses. Moreover, this mandate allows "SWAMAR" to raise the necessary capital.

Paragraph 167 - NAMTEC agrees. However, we recommend that a pre-bid conference be held for SWAMAR 30 days prior to any such auction in order for "SWAMARs" to receive proper information on what is expected.

Paragraph 168 - NAMTEC agrees.

II. SEQUENCE OF BIDDING

The Commission requests comment on how structure the order of bidding on licenses to be offered through the auction system. In particular, the Commission proposes to auction all geographic regions within one spectrum block before proceeding to auction the next available spectrum block. NPRM ¶ 52. NAMTEC supports the Commission's proposal.

Moreover, NAMTEC opposes the Commission's proposal to offer spectrum block regions in descending order of population. NPRM ¶ 53. Offering licenses in this manner would enable wealthy firms to dominate the largest markets in the nation in such a way that smaller entities will not be able to compete. As the Commission noted, this type of bid sequencing primarily would assist those seeking to create regional service areas. NPRM ¶ 53. NAMTEC believes that each spectrum area should be available equally to all qualified bidders.

NAMTEC does, however, support the Commission's proposal to allow bids for groups of licenses (i.e., combinatorial bidding). MPRM ¶ 57.

III. CONSTITUTIONALITY OF MINORITY PREFERENCE PROVISIONS

The Commission requests comment on how it can satisfy the requirements of caselaw in the area of minority preferences while complying with the statutory provisions directing it to ensure that minority owned-businesses are directing it to ensure that minority owned-businesses are given the opportunity to participate int he provision of spectrum-based services. NPRM ¶ 73. In response to that congressional mandate, the Commission proposes to employ spectrum block set-asides, bidding preferences, installment payments for winning minority owned-businesses, and tax certificates to ensure minority participation. In essence, then, the question is whether these preferences, recommended by Congress and proposed by the Commission, can pass constitutional muster. NAMTEC maintains that they can.

1. Standard of Scrutiny to be Applied

The Commission observes that a court reviewing any benign race-conscious measures mandated by Congress will conclude that the measures are constitutionally permissible if they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives. NPRM ¶ 73. This standard of review is known as intermediate scrutiny. Metro Broadcasting v. F.C.C., 110 S.Ct. 2997, 3031 (1990) (O'Connor, J., dissenting). In lieu of intermediate scrutiny, the Supreme Court has applied what is called strict scrutiny to minority preference programs not mandated by Congress, See City of Richmond v. J.A. Croson Company, 488 U.S. 469, 505-507 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S., 267, 274 (1986). Strict scrutiny examines whether preferential measures serve compelling governmental objectives and are necessary to the achievement of those objectives.

NAMTEC agrees with the Commission that intermediate scrutiny is the appropriate standard under which to review a minority preference program mandated by Congress. The Supreme Court declared in Metro Broadcasting that "benign race-conscious measures mandated by Congress -- even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental objectives within the power of Congress and are substantially related to those objectives." Metro Broadcasting, 110 S.Ct. at 3008-09. NAMTEC believes that this standard would apply in the instant case.

Moreover, applying intermediate, as opposed to strict scrutiny is consistent with the deference shown by the Supreme Court to the role of Congress in mandating minority preferences before. In Fullilove v. Klutznick, 448 U.S. 448 (1980), for example, the Court noted that Congress occupied a special position among the three branches of government with respect to content and the quality of the basis on which preferential measures may be ordered. The Court explained that "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." Id. at 478. That Congress may act on a weaker factual underpinning than other governmental bodies is consistent with

the Court's policy of examining the result of the congressional action under a lower standard of scrutiny.

Similarly, in Croson, Justice O'Connor wrote in a plurality opinion, "That Congress may identify and redress the effects of society-wide discrimination does not mean, a fortiori, the States and their political subdivisions are free to decide that such measures are appropriate." Croson, 488 U.S. at 490. Thus, in Croson, as in Fullilove, the deference shown to Congress was clear, For this reason, NAMTEC supports the Commission's conclusion that intermediate scrutiny would be appropriate in the instant case.

Notwithstanding this analysis, NAMTEC acknowledges that four Justices dissented from the decision of the Supreme Court in Metro Broadcasting. Those Justices maintained that the Court should apply strict scrutiny when reviewing any program that accords preferences based on race, regardless of the source of the program. Metro Broadcasting, 110 S.Ct. 3030 (O'Connor, J., dissenting). In support of that position, Justice O'Connor asserted that the deference shown to Congress in the Croson opinions reflected the authority of Congress only insofar as it emanated from Section 5 of the Fourteenth Amendment. Because Section 5 empowers Congress to act only with respect to the States, Justice O'Connor argued, the special latitude given to Congress -- and the lower scrutiny that came with it -- did not extend to the facts of Metro Broadcasting, which concerned a federal program administered by federal officials. Id.

NAMTEC notes, however, that the Court in Fullilove recognized the many sources of authority under which Congress may act in the area of minority preferences. Chief Justice Berger indicated that the public works employment program upheld in that case could have been lawfully enacted by Congress under the Spending Power of Article I, § 8, cl. 1, under the Commerce Clause of Article I, § 8 cl. 3, or under Section 5 of the Fourteenth Amendment. Fullilove, 448 U.S. at 473-75. Indeed, the Chief Justice acknowledged that the program reviewed in Fullilove was enacted principally as an exercise of the Spending Power. Id. at 473-74.

Moreover, in a concurring opinion, Justice Powell expressly recognized the

authority of Congress to address minority preference issues under the Commerce Clause, as well as under the Civil War Amendments. Id. at 499-502 (Powell, J. concurring). Thus, that the instant minority preference provisions were not enacted by Congress under Section 5 of the Fourteenth Amendment does not mean that intermediate scrutiny is not still applicable.[1]

According, NAMTEC agrees with the Commission that intermediate scrutiny is the appropriate standard under which to review a minority preference program mandated by Congress. What follows is a review of the instant minority preference provisions under the two prongs of that intermediate scrutiny. This analysis confirmations the NAMTEC view that he preference recommended by Congress and proposed by the Commission can pass constitutional muster.

2. Prong 1: The Minority Preference Serve an Important governmental Purpose

The Commission has noted that the legislative history of the Budget Act

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[1] Assuming arguendo that the Supreme Court as presently constituted would overrule the Metro Broadcasting intermediate scrutiny holding, NAMTEC assets that the instant preference provisions would still pass constitutional muster. As noted above, Justice O'Connor, dissenting in Metro Broadcasting, maintained that the Fullilove Court applied strict scrutiny to the minority preference program reviewed in that case. Indeed, Justice Powell expressly applied strict scrutiny to the program in his concurring opinion in Fullilove. See Fullilove, 448 U.S. at 507 (Powell, J. concurring). Under both Chief Justice Berger's examination (reported to the strict scrutiny by Justice O'Connor) and Justice Powell's review, however, the public works employment program at issue in Fullilove was upheld.

NAMTEC, in turn notes that the instant program bears considerable resemblance to that which passed muster in Fullilove. Here, as in Fullilove, Congress directed a federal agency to administer a preference program designed principally to ensure economic opportunity for members of minority groups. See Section 2 infra; Fullilove, 448 U.S. at 459-61. Both programs are premised on a lack of opportunity found to be available to minority groups in the two fields, and both program are to be administered on a national scope. Although in the Fullilove program (and thus ensure that the program was narrowly tailored), the Commission can employ such provisions here to see that the instant programs fairs better on review. See Adarand Constructors v. Skinner, 790 F. Supp. 240, 244 (d. Colo. 1992) (upholding U.S. Department of Transportation minority preference program that had no congressionally mandated waiver provision, but which was governed by a waiver provision instituted by the agency).

"provides little guidance regarding the relationship between the preferential measures and the goal Congress hopes to achieve . . . ." with those measures. NPRM ¶ 73 n.48. The Commission submits, however, that other similar provisions in Title VI of the Budget Act provide a more distinct view of the intent of Congress in enacting the provisions. Id. That intent, according to the Commission, was to provide economic opportunities for members of minority groups through the provision of spectrum-based services. Id. NAMTEC agrees with the Commission's determination of the legislative intent behind Section 309(j)(4)(D), and submits that this intent qualifies as an "important governmental purpose within the power of Congress."

To ascertain that goals of Congress underlying the minority preference provisions at issue in the Fullilove and Metro Broadcasting decision, the Supreme Court in each case reviewed the findings made by Congress in support of those provisions. Fullilove, 448 U.S. at 447-80; Metro Broadcasting, 110 S.Ct. at 3009-11. Although there are no specific findings in the legislative history of the Budget Act with respect to the lack of economic opportunity for minority-owned businesses, Congress has examined that lack of opportunity -- both in and out of the communications field -- before.

In a House conference report accompanying the Communications Amendments Act of 1982, for example, the Conference Committee asserted that diversifying the media of mass communications was important because it promoted "ownership of telecommunications facilities . . . ." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S.C.C.A.N. 2261, 2287. See also Metro Broadcasting, 110 S.Ct. at 3013-16 (detailing the many times Congress has considered telecommunication minority preferences).

Moreover, in debate on a Department of Defense minority owned-business preference program, the sponsors of the legislation pointed to the disparity between the percentage of defense contracts going to minority businesses in 1985 (2.2 percent) and the percentage of military personnel from minority groups at the same time (26.7 percent) as evidence that the preference was needed. 131 Cong. Rec. H 4981, 4982-93 (daily ed. June 26, 1985) (statements of Reps. Savage and Conyers). Similarly, a

Department of Transportation minority owned-business preference was introduced in 1982 because minorities at that time were experiencing markedly greater unemployment versus the national figure of 10.8 percent). 128 Cong. Rec. H 8954 (daily ed. Dec. 6, 1982) (statement of Rep. Mitchell). The transportation preference program was offered simply to provide a source of jobs for minorities, and was passed without opposition. Id. Through these and other examinations of the lack of opportunities for minority owned-enterprises, Congress has developed an institutional expertise on the issue of minority opportunities.

This developed expertise is important for the purposes of constitutional scrutiny. In his concurring opinion in Fullilove, Justice Powell discussed the nature of the legislative process as it applied to congressional findings in support of a legislative purpose. Justice Powell explained:

> [The] special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 502-03 (Powell, J., concurring) (emphasis added). Since a full appreciation of the legislative process counsels against a court limiting its Metro Broadcasting, 110 S.Ct. at 3013, NAMTEC maintains that the congressional goal of providing economic opportunity for minority owned-businesses is supported by relevant legislative findings.

Moreover, the goal of providing economic opportunity for minority owned-businesses has been found before to be an "important governmental purpose." In Fullilove, for example, the Court considered the merits of a minority preference provision that required at least 10 percent of federal funds granted for local public works projects to be used by the state or local grantee in contracts with minority owned-businesses. Underlying that provision was a determination that the minority business community was "'sorely in need of economic stimulus but which, on the basis

of past experience with government procurement programs, could not be expected to benefit from the public works program as then formulated.'" Fullilove, 448 U.S. at 459 (quoting 123 Cong. Rec. 5097, 5097-98 (1977) (remarks of Rep. Mitchell)). See also Fullilove, 448 U.S. at 459 (indicating that the preference was designed to '"promote a sense of economic quality in this Nation"'). Against this background, the Court found that the establishment of a preference was within the power of Congress. Id. at 475-77. See also Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 245 (d. Colo. 1992) (upholding the Department of Transportation minority preference program where the important government purpose was to decrease high minority unemployment). The congressional purpose in the instant matter is no different than the goals found to be "important" and "within the power of Congress" in Fullilove and Adarand Constructors. Thus, the minority preference provisions enacted in section 309(j)(4)(D) serve an important governmental purpose within the power of Congress.

3. Prong 2: The Budget Act Preferences are Substantially Related to that Important Government Purpose

The Budget Act preferences are substantially related to the government purpose of creating economic opportunities for minority owned-businesses. As noted in Section 2, supra, Congress has developed an institutional expertise in the areas of minority preferences and opportunities that is entitled to great weight from reviewing courts. In mandating specific preferences for members of minority groups in the past, and in the instant case, Congress has made clear its view that the goal of creating economic opportunities for minorities is advanced by such preferential measures.

Even without the deference shown to the considered judgement of Congress, it is apparent that affording minority owned-businesses greater access to licenses for spectrum-based services will help to create economic opportunities for those businesses. Through the provision of PCS under the authority of a Commission license or through the sale of that license to another industry member, the preferred minority owned-business will be able to generate considerable revenues that might not otherwise be accessible. The preferences, thus, are substantially related to the important governmental purpose.

Notwithstanding the preceding analysis, as part of the review of prong two of intermediate scrutiny a variety of courts reviewing minority preference programs have examined whether the programs are narrowly tailored to serve the important governmental purpose. Narrow tailoring is invoked to ensure that there is an appropriate fit between the means chosen by congress (here, preferential measures) and the ends sought to be advanced (economic opportunity). In Fullilove, for example, the court determined that the Public Works Employment Act preferences were narrowly tailored -- and, thus, substantially related to the important governmental purpose -- because the preferences included specific provisions for "exemption" and "waiver." The exemption provision ensured that only legitimate minority owned-businesses participated, and the waiver provision ensured that the bright line minority participation goal (10 percent) would be waived when no qualified minority owned-businesses (i.e., those with the capacity to complete the work contracted for) were available. Fullilove, 448 U.S. at 486-87. The provisions thus ensured that the minority preference program did not overreach the scope of the important government purpose,. See also Adarand Constructor, Inc. V. Skinner, 790 F.Supp. 240, 244-45 (d. Colo. 1992) (finding the Department of Transportation minority preference program to be narrowly tailored because it included specific provisions for exemption and waiver).

To ensure that the minority preference provisions established in the instant matter survive constitutional scrutiny, NAMTEC encourages the Commission to consider promulgating safeguards similar to the exemption and waiver provisions detailed above. The Commission's proposals for assessing the eligibility of entities applying for minority preferences will operate effectively as exemption safeguards for the purposes of constitutional scrutiny. NAMTEC has commented on those proposals below. In addition, the Commission should consider establishing procedures under which set-aside spectrum blocks are released to general bidding if no qualified minority entities apply to bid on the blocks. In concert with the manifest connection between licensing preferences and minority economic opportunities, these provisions will help to ensure that the instant minority preferences are "substantially related

to the important governmental purpose."

For these reasons, NAMTEC submits that the preferences recommended by Congress sand proposed by the Commission can pass constitutional muster.

IV. IMPLEMENTING THE MINORITY PREFERENCE PROVISIONS

A. Types of Preferences to be Utilized

1. Set-Aside Spectrum Blocks

The Commission proposes to set aside for designated entity-only bidding on 20 MHz block of spectrum (Block C) and one 10 MHz block of spectrum (Block D), each of which would be classified for BTA service. NPRM ¶ 121. NAMTEC supports the Commission's proposal to set aside these blocks. This reservation of space will ensure that designated entities are able to bid for PCS licenses without having to compete against the more-entrenched parties that Congress did not identify for special consideration. In turn, designated entities will have a greater opportunity to participate int he provision of spectrum-based services and to experience increased economic opportunity. NAMTEC does, however, believe that the Commission should establish special aggregation rules for the set-aside blocks to avoid limiting the economic and technical value of the licenses awarded for the spectrum.

2. Bidding Preferences

The Commission proposes to adopt bidding preferences for designated entities, presumably applying when a designated entity bids for a non-set-aside block of spectrum against a non-designated entity. NPRM ¶ 73. NAMTEC supports this proposal and encourages the Commission to establish such a preference. Toward that end, NAMTEC suggests that the Commission should look to the procedure recommended by the Small Business Advisory Committee (SBAC) and referenced in footnote 61 of the NPRM.

One variation of the procedure would permit a bidder to discount the price that would otherwise be paid based on a qualitative assessment of the bidder's business development plan (in pursuit of technical innovation). NPRM ¶ 80 n. 61. Instead of tying the discount to business development or technical innovation, NAMTEC suggests that the Commission offer a discount linked to a bidder's status as a

designated entity. This would enable a designated entity to compete for licenses in the non-set-aside spectrum blocks against bidders with greater financial resources. NAMTEC suggests that the Commission employ a 10 percent discount on a cash bid by a designated entity.

In the alternative, NAMTEC suggests that the Commission should fashion a discount linked to a level of minority ownership or control of a bidding entity. This discount would function in much the same manner as minority application enhancements presently offered int he broadcast license comparative hearing field. See, e.g., Waters Broadcasting Corp., 91 F.C.C.2d 1260 (1982). Since the "application" in the instant case would be in the form of a bid for license, the Commission could "enhance" that bid by applying a discount rate linked to the percentage of minority ownership or control of the entity. In that way, an entity with a greater degree of minority participation can receive a greater discount against the figure bid at auction. NAMTEC believes that such a system would almost certainly operate to increase designated entity participation in the provision of spectrum-based services.

3. Installment Payments

The Commission requests comment on whether to allow designated entities to use installment payment plans with interest for bids within set-aside spectrum blocks, and whether to utilize installment payments when designated entities bid for non-set-aside blocks of broadband PCS spectrum. NPRM ¶ 121. The Commission proposes to assess interest on installment payments at the prime rate, plus 1 percent, on a fixed or variable basis. NPRM ¶¶ 80 n.57, 121 m. 116.

NAMTEC supports the Commission's proposal to afford installment payment options to designated entity bidders. NAMTEC believes that the Commission should utilize a straight note with a term of ten years to link the period of amortization to the term of the license awarded. Rather than utilize the prime rate as the benchmark for the rate of interest, however, AWCC believes that the Commission should utilize the federal funds rate (perhaps plus 1 percent) as the benchmark in order to offer the best possible payment terms to the successful designated entity

bidder. The rate of interest should be fixed for the duration of the indebtedness to foster ease of administration both for the bidding entity and for the Commission.

Moreover, NAMTEC encourages the Commission to permit designated entities to amortize the note through interest-only payments in the first several years of the repayment term, followed by interest plus principal payments for the balance of the term. Alternatively, the Commission could authorize interest-only payments for the full term, with a balloon principal payment at end of the repayment period.

Each of these options would afford designated entities the benefits of an aggressive venture financing plan and would help to ensure the participation of designated entities in the provision of spectrum-based services.

The Commission also requests comment on how to treat licensees who default on timely payments to the Commission. NPRM ¶ 71. Instead of canceling the license immediately, NAMTEC suggest that the Commission should permit a three-to-six month grace period for the licensee to cure the shortfall in order to foster continuity of service. If, however, the licensee cannot cure the shortfall int hat period, or if the licensee has defaulted in that period, or if he licensee has defaulted on several prior occasions, the Commission should cancel the license and offer it for reauction.

4. Tax Certificates

The Commission requests comment on whether to provide tax certificates for designated entities, either within or outside of the set-aside spectrum blocks. NPRM ¶ 121. The Commission proposes, inter alia, to issue tax certificates to investors in minority owned or controlled entities subject to competitive bidding whenever those investors sell their interests int he entity (provided the entity remains minority owned or controlled). NPRM ¶ 80 n.64 (detailing SBAC tax certificate proposals. Offering tax certificates to investors in designated entities will help the Commission to attract capital for those entities. Improved capital formation, in turn, will aid those entities in bidding for licenses and constructing service facilities, and will help the Commission to satisfy the congressional mandate to ensure designated entity participation in the provision of spectrum-based services.

For that reason, NAMTEC believes that tax certificate benefits should be

afforded to a designated entities (including consortia) regardless of whether they are subject to competitive bidding. To deny tax certificate treatment to entities that bid for set-aside blocks would be to force those entities to choose between bidding for the more accessible set-aside spectrum blocks on one hand, and attracting capital by way of stock sales on the other. Instead, AWCC urges the Commission to permit designated entities bidding for set-aside spectrum blocks also to attract capital for the venture through the use of tax certificate treatment.

Moreover, NAMTEC maintains that tax certificates should be granted to designated entity shareholders upon divestiture only when the seller reinvests the sale proceeds in a qualified replacement property. This is the procedure currently employed by the Commission int he broadcast and cable fields. NAMTEC believes this design to be a sound one primarily because it avoids encouraging designated entity investors to "get out" of the industry in order to qualify for the tax certificate. Utilizing the same design would also facilitate implementation of the program by the Commission.

Finally, NAMTEC supports the Commission proposal to offer tax certificates to anyone investing in a specialized small business investment company (SSBIC), or to any SSBIC that invests in a designated entity. NPRM ¶ 80 n.64. In addition, NAMTEC suggests that the Commission consider moving any designated entity tax certificates "back in time" to the initial purchase transaction. Such a mechanism would operate like an investment tax credit to encourage investing in designated entities, as opposed to selling a designated entity interest in order to enjoy favorable tax treatment.

B. Scope of Minority Preferences

The Commission has requested comment on a number of issues related to the scope of the preferences to be afforded to designated entities.

1. Preferences for Non-Set-Aside Blocks

The Commission requests comment on whether to offer installment payments and tax certificates to designated entities bidding for non-set-aside spectrum blocks. NPRM ¶ 121. As noted above, NAMTEC believes that the Commission should offer

these preferences outside of set-aside areas.

Of particular importance in this instance is the fact that the largest block of spectrum the Commission proposes to set-aside for designated entities is the 20 MHz block C. Although the spectrum in block C is contiguous -- and, thus, particularly compatible -- with that in the 30 MHz block B, the 40 MHz aggregation ceiling announced by the Commission in the PCS Order effectively prevents a combination of the two blocks for the provision of service. A holder of a 30 MHz block is forced to aggregate with one of the 10 MHz blocks, and the 20 MHz block reserved especially for designated entities remains behind. Under the 40 MHz aggregation ceiling, it cannot be joined to a larger system.[2]

To implement more fully the congressional directive that designated entities be given the opportunity to participate int he provision of spectrum-based services, NAMTEC suggests that the Commission offer installment payments and tax certificates to designated entities bidding for non-set-aside blocks. A designated entity that wins a 30 MHz license, for example, will be able to offer a broader range of services than with the set-aside 10 or 20 MHz licenses, and will be better able to attract capital as a result. By offering preferences on those non-set-aside 30 MHz blocks, the Commission will increase the likelihood that a designated entity will win a license for that spectrum.

2. Rural Telcos

A second issue on which the Commission requests comment is whether rural telcos should be afforded preferential measures only when the coverage of the licenses for which they are bidding effectively coincide with their franchised service areas. NPRM ¶ 77. The Commission also asks whether the fact that some rural telcos receive financing from the REA should have any bearing on the type of preferences they receive. NPRM ¶ 77.

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[2] As Commissioner Andrew C. Barrett noted in his Dissenting Statement in the PCS Order, "The 20 MHz block in the lower band [i.e., 1850-1990 MHz] contemplated for small business could become an 'albatross' allocation." Second Report and Order in GEN Docket No. 90-314, FCC 93-451 (Sept. 23, 1993), Dissenting Statement of Commissioner Andrew C. Barrett, at 10.

NAMTEC asserts that rural telcos should not be permitted to use any REA funds for bidding related up-front payments, deposits, or license costs. NAMTEC also agrees with the Commission that preferences afforded to rural telcos should be subject to geographical limitations.

3. Designated Entities and Consortia

Finally, the Commission requests comment on whether consortia that include designated entities should be afforded preferences in the same manner as are designated entities standing alone. NPRM ¶¶ 78, 121. NAMTEC supports the Commission's proposal to extend preferential treatment to designated entity-inclusive consortia. Although it is not detailed in the NPRM, NAMTEC assumes that such a provision would afford full preferential treatment to any consortium that can show designated entity control. If enacted, this proposal will encourage partnerships between designated entities and non-designated entities for the provision of spectrum-based services.[3] Those partnerships will help designated entities gain access to larger markets, to more sources of capital, and to increase service opportunities.

Moreover, NAMTEC encourages the Commission to consider a "percent participation benefit" that extends preferential treatment to consortia based on a percentage of designated entity involvement in the group. Such a system would held to avoid affording preferences only to consortia that are effectively controlled by designated entities. Where a consortium with only 20 percent designated entity involvement bids for a license, for example, the Commission could permit installment payments for 20 percent of the consortium's winning bid price. Under this system, smaller designated entities (i.e., those that are less likely to gain a controlling interest in an industry consortium) will still be viewed as viable partners by non-designated entities interested in pooling resources. This, in turn, will improve access

[3] The FCC Small Business Advisory Committee has recognized that making possible strategic alliance with large entities is a crucial part of providing economic opportunity for the groups singled out for special treatment by Congress. See Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314, 10 (Sept. 15, 1993).

to markets, capital, and service opportunities for bid and small designated entities alike.

C. Financial Issues for Designated Entities

1. Financial Information in the Bidder Application

The Commission requests comment on what types of financial information should be required of entities applying to bid in an auction.

- Self-certification (¶ 80 n. 60)
- One-year constructing and operating costs (¶ 228)

2. Up-Front Payments and Deposits

The Commission requests comment on what types of up-front payments and deposits should be required of designated entities during and after the bidding process. First, as a condition of entry to an auction, the Commission proposes to require each bidding application to tender to the Commission an up-front payment calculated according to the amount of spectrum and population covered by the license sought. NPRM ¶ 102-03. Second, the Commission proposes to require a deposit to be paid to the Commission by the high bidder in an auction before that bidder is declared officially to be the auction winner. NPRM ¶ 107. The Commission proposes to set the deposit rate at the difference between the amount tendered as an up-front payment and 20 percent of the winning bid. NPRM ¶ 107. Third the Commission proposes to retain the up-front payment and deposit of any auction winner that is later found to be ineligible, unqualified, or unable to meet installment payments. NPRM ¶ 109. The Commission also proposes to bar any such auction winner from all future auctions. NPRM ¶ 109.

NAMTEC supports the Commission's proposals in this area. The Commission is correct to assert that only serious and qualified bidders should be allowed to participate in the auction process. Nonetheless, NAMTEC believes that the Commission should consider the merits of applying a lowered standard to designated entities applying for entry to an auction. In particular, NAMTEC maintains that a 50 percent discount applied to the up-front payment and deposit required of designated entities will serve the same deterrent function as the full-priced charges,

but will also take into account the economies of scale that otherwise might discourage even a qualified designated entity. Indeed, it would be an inharmonious construction to permit designated entities to pay for licenses on installment plans to encourage bidding, but require them to tender unusually large sums to gain admittance to the bidding site. NAMTEC believes that a designated entity 50 percent discount would ameliorate this dilemma.

Moreover, to satisfy the Commission's need to ensure the financial strength of winning bidders, NAMTEC encourages the Commission to accept investment bankers' "highly confident" letter on behalf of designated entities in lieu of a full deposit price. Accepting these letters would permit the Commission to review the financial position of a winning designated entity bidder -- without the concomitant burden of undertaking the examination itself -- while relieving the designated entity of the burden of tendering a unmanageable deposit.

Finally, NAMTEC believes that the Commission should consider requiring up-front payments to be make not with the bidder application, but at he auction site itself. This would afford applicants more time to arrange for financing, and would permit them to retain the interest earned on the funds up to the auction date. Given the size of the payments contemplated by the Commission, that interest income in many cases will be significant. Since the SBAC has noted that capital formation is one of the major barriers to entry facing certain designated entities, NPRM ¶ 80, permitting day-of-auction up-front payments would be consistent with the congressional directive to increase designated entity participation in the provision of spectrum-based services.

V. AGGREGATION AND DESIGNATED ENTITIES

As noted above, NAMTEC supports the Commission's proposal to set aside the 20 MHz spectrum block and one 10 MHz spectrum block for designated entity-only bidding. Nonetheless, NAMTEC is concerned that the 20 MHz block will be rendered technologically and economically useless by virtue of the 40 MHz aggregation ceiling established in the PCS Order. To avoid restricting the quality of the participation of

designated entities in the provision of spectrum-based services, NAMTEC suggests that the Commission consider a variety of spectrum block aggregation mechanisms for designated entity licensees.

Primarily, NAMTEC encourages the Commission to permit a designated entity 20 MHz block licensee to "split" the block into two 10 MHz blocks that can be separated and sublicensed to 30 MHz block owners. Such a plan would conform to the 40 MHz aggregation ceiling established in the PCS Order, but would make the 20 MHz of spectrum in block C much more attractive to larger operators as they attempt to utilize all available spectrum up to the ceiling. In turn, the plan would increase the prospects that spectrum licensed to a designated entity would be joined to a larger - and more profitable - system.

In the alternative, the Commission should consider permitting 30 MHz block licensed to be a designated entity. By creating this exception to the 40 MHz aggregation ceiling, the Commission would make the 20 MHz block set aside for the designated entities even more attractive to larger PCS operators than it would be under the plan detailed above -- particularly since the spectrum in the 30 MHz block B is contiguous with the spectrum in the set-aside 20 MHz block C. This, in turn, will generate partnering and capital formation opportunities for designated entity holders of 20 MHz blocks, and will help to effectuate the Commission's legislative mandate.

Finally, NAMTEC suggests that the Commission consider permitting the aggregation of a 10 MHz block licensed to a local cellular provider with the spectrum block licensed to a designated entity. As in the preceding cases, this would render the designated entity-held blocks more attractive for aggregation and, thus, will help to ensure designated entity participation in the provision of spectrum-based services and increased economic opportunities for members of the designated groups.

VI. SAFEGUARDS: ANTITRAFFICKING & ANTISHAM PROVISIONS

A. Antitrafficking Provisions

The Commission requests comment on how to implement effective

antitrafficking provisions to prevent unjust enrichment of licensed entities. NPRM ¶ 84. Although the Commission is directed by the Budget Act to established these measures to avoid license speculation within set-aside spectrum blocks, the Commission is concerned that unduly restrictive antitrafficking provisions ultimately could delay the provision of service to the public. NPRM ¶¶ 83-84. Consequently, the Commission proposes to implement a series of financial disincentives to premature trafficking in lieu of a bright line trafficking prohibition. NPRM ¶ 84. NAMTEC however, favors a bright line prohibition.

Specifically, NAMTEC supports a prohibition on all license trafficking for the three years following the award of the license. NAMTEC maintains that the goal of Congress to ensure designated entity participation in the provision of spectrum-based services is furthered by discouraging those who would bid on a set-aside block simply to speculate on the value of the license following the auction. Of course, the Commission could provide flexibility by way of a waive of the bright line prohibition when a designated entity license-holder seeks to transfer the license to another designated entity. In that case, the congressional purpose would be served despite the "premature" transfer. In either case, however, the bright line rule would require far fewer administrative resources than a system of financial disincentives based either on projected license values outside of the preferred blocks, or on a percentage of the value of the transfer transaction.

Moreover, NAMTEC believes that implementation of the bright line rule would be relatively simple because the Commission utilizes similar transfer restrictions in other contexts. For example, the Commission applies a three-year antitrafficking restriction to new cable licensees, 47 C.F.R. § 76.502 (1983), and a variable blackout period to recipients of public mobile radio licenses. See, e.g., Cellular Renewals, 7 F.C.C. Rcd. 719, 725 (1991). In those cases, as in the instant matter, concerns about delaying the provision of service to the public were outweighed by the need to avoid license value speculation. In this rule making, then, NAMTEC encourages the Commission to consider utilizing a three year bright line rule.